APPEAL NO. 030740
FILED MAY 15, 2003

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). A contested case hearing (CCH) was held on February 20, 2003. The hearing officer decided that the respondent (claimant herein) was entitled to supplemental income benefits (SIBs) for the 10th quarter. The appellant (carrier herein) files a request for review, arguing that the hearing officer erred in this determination. The carrier challenges a number of the hearing officer's findings of fact. The carrier contends that the hearing officer erred in finding that the claimant was unable to work during the qualifying period for the 10th quarter or that his unemployment during the qualifying period was a direct result of the impairment from his compensable injury. The claimant responds that the decision of the hearing officer should be affirmed and that the hearing officer did not err in finding that the great weight of the medical evidence was contrary to the opinion of the designated doctor.

DECISION

Finding sufficient evidence to support the decision of the hearing officer and no reversible error in the record, we affirm the decision and order of the hearing officer.

The parties stipulated that the claimant suffered an injury in the scope and course of his employment on _____, to at least his cervical spine, lumbar spine, and right knee; that the claimant reached maximum medical improvement on August 17, 1998, with a 35% impairment rating; that the 10th quarter for SIBs started on November 19, 2002, and ended on February 17, 2003; that the qualifying period for the 10th quarter started on August 7, 2002, and ended on November 5, 2002; that the claimant made no effort to obtain employment during the qualifying period for the 10th quarter; that the 9th quarter was paid by agreement; and that Dr. W was appointed as the designated doctor on the issue of ability to return to work pursuant to Section 408.151.

Medical records indicate that the claimant was injured when he fell and rolled 80 feet down a hill while doing seismographic work. The claimant testified that he injured his neck, back, and right knee in the fall. The claimant eventually underwent low back surgery that was apparently unsuccessful. The claimant continued with various modalities of treatment, none of which appeared to give him significant relief.

The claimant testified that his condition continued to deteriorate to the degree that he has become unable to walk without a walker and still falls using the walker. The claimant testified that he has lost strength in his legs and in his hands to the degree that he can no longer shave or dress himself, can no longer do any household chores, and can no longer control a fork, spoon, or knife. The claimant applied for SIBs for the 10th quarter, contending that he was unable to work at all. This was disputed by the carrier and by letter of September 4, 2002, the Texas Workers' Compensation Commission

(Commission) appointed Dr. W as a designated doctor to determine whether the claimant's condition had sufficiently improved to allow him to return to work.

In a report dated October 7, 2002, Dr. W detailed the results of her examination of the claimant and his medical records. She stated in this letter that she would order a functional capacity evaluation (FCE) to get a better picture of the claimant's functional ability and would issue an addendum to her report upon receiving the results of the FCE. An FCE was performed on October 24, 2002, and Dr. W issued an addendum to her report dated November 4, 2002, to which she attached a Commission Work Status Report (TWCC-73). In her November 4, 2002, report, Dr. W stated as follows:

> Therefore, I feel that the patient's overall functional capacity that relates to his compensable injury are more limited non-compensable factors than due to compensable factors. These would be the patient diabetes and associated complications from the diabetes (such as peripheral neuropathy). There are also severe dependency and psychosocial factors limiting this patient's efforts and creating a highly increased perception of pain. Therefore, if we exclude all of those other factors and only considered the compensable low back injury, there is absolutely no reason this patient could not work in a light physical demand level position. The TWCC-73 form only addresses the compensable injury. Certainly, the patient's fine motor manipulation and strength in the hands are decreased, but again this is due to the peripheral neuropathy and not due the compensable injury.

The record does not show when the Commission received Dr. W's November 4, 2002, addendum, but the addendum indicates on its face that a copy was sent to the carrier. The carrier's copy of the addendum is file-marked as being received on November 14, 2002.

The claimant's attorney wrote to the Commission in a letter dated January 20, 2003, and requested that the Commission write to Dr. W and send her medical records which the attorney had received from Dr. D, a neurosurgeon. The claimant testified that he had originally consulted Dr. D on December 10, 2003, and that Dr. D had recommended he undergo cervical surgery. Dr. D stated as follows in a December 16, 2002, letter which was enclosed in the attorney's letter to the Commission:

> The patient presents after having EMG nerve conduction studies done by [Dr. B]. These show evidence of polyneuropathy and also some slowing in the ulnar nerve across the elbow. I think the main reason why the patient is symptomatic is form [sic] the polyneruopathy, but the patient also has significant disease in the neck. The patient has hard and soft disc at the C4-5, C5-6, and C6-7 levels, being most significant at the C6-7 level. The cord is pancaked because of the anterior compression and there appears to be signal change within the cord at those levels. The patient understands that most of the symptoms he is having right now are

> coming from the neuropathy, but it is going to difficult to be sure how much is coming from the neck because of the peripheral neuropathy. The patient would like to get the neck fixed, and understands the risks and benefits of surgery.

Dr. D's recommendation for surgery was denied by the carrier and the question of whether or not the claimant will have surgery on his neck appears to remain in dispute at the time of the CCH. The Commission did write to Dr. W on January 23, 2002, to ask her to review and consider additional medical records. Dr. W responded in a letter of January 31, 2003, in which she stated that she reviewed 2-1/2" of medical records sent to her by the Commission. Dr. W summarized the medical records she received and stated that her opinion as to the claimant's work status remained unchanged. The attorney for the claimant argued that the records he had requested the Commission send to Dr. D were not 2-1/2" thick and that Dr. W's detailed summary of the records she did receive from the Commission did not mention the records from Dr. D or any of the information included in them. The attorney argued that the reasonable inference from this was that Dr. W remained unaware of the diagnostic testing done at the direction of Dr. D or his opinion concerning the claimant's need for cervical surgery.

Also in evidence was a letter from Dr. Da in which he stated as follows:

> This is in reference to the work status on my patient, [claimant]. At this time, his current condition does not allow the patient to perform any type of gainful employment predominantly due the fact that the patient has a discogenic compression in both the cervical and lumbar regions. It is for this reason that the patient cannot even perform sedentary type of work for which exacerbation would occur with prolonged periods of sitting and standing. He has restricted motion in all activities of daily living without exacerbation or aggravation. Additional surgical intervention has been recommended by the orthopedic surgeon. Therefore at this time, the patient's work status is that of currently disabled. He has been continuously disabled including dates 8/7/02 thru 11/5/02.

A very similar report from Dr. Dar is in evidence stating that the claimant was unable to work during the period from 02/06/02 through 08/12/02 for the same reasons.

The hearing officer's Findings of Fact and Conclusions of Law include the following:

FINDINGS OF FACT

> 6. Claimant is unable to return to his prior employment or any form of manual labor involving repetitive motion or lifting greater than eight pounds.

7. Claimant's inability to obtain employment during the qualifying period was a direct result of the impairment from the compensable injury.

8. The designated doctor has stated the Claimant has an ability to work.

9. Claimant was able to work with his diabetes before the injury and the peripheral neuropathy does not keep Claimant from performing the sedentary work he would be able to perform under the doctor's restrictions.

10. Claimant did not look for work each and every week of the qualifying period.

11. Claimant has a severe cervical condition which was not previously recognized by his doctors and was not addressed by the designated doctor's report.

12. [Dr. Dar] by narrative dated August 12, 2002, details why he believes the Claimant cannot work.

13. [Dr. D] in his reports of December 10, 2002, and December 16, 2002 addresses why Claimant is unable to work and he plans to perform cervical surgery early in 2003.

14. The great weight of the other medical evidence is contrary to the report of the Commission designated doctor.

15. Claimant's medical condition makes it unsafe for him to attempt to retrain at the current time and [the Texas Rehabilitation Commission] has no services currently available that Claimant could use.

16. Claimant is unable to use vocational rehabilitation services at the current time due to his medical condition.

17. Claimant did make a good faith effort to obtain employment commensurate with his ability to work during the qualifying period for the tenth quarter when he didn't look for work.

CONCLUSIONS OF LAW

3. Claimant is entitled to [SIBs] for the 10th quarter starting November 19, 2002 and ending February 17, 2003.

Eligibility criteria for SIBs entitlement are set forth in Section 408.142(a) and Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § Rule 130.102 (Rule 130.102). The good faith and direct result criteria of Section 408.142(a) and Rule 130.102(b) are in dispute in the present case. Regarding the "direct result" criterion, the Appeals Panel has consistently stated that an injured employee need not establish that the impairment is the only cause of the unemployment or underemployment but only that it is a cause, and that the direct result requirement is "sufficiently supported by evidence that an injured employee sustained a serious injury with lasting effects and could not reasonably perform the type of work being done at the time of the injury." Texas Workers' Compensation Commission Appeal No. 960028, decided February 15, 1996. Applying this standard, we find no error in the hearing officer's finding that the claimant's unemployment during the qualifying period was a direct result of his impairment from the compensable injury.

The main point of dispute in this case is whether the claimant satisfied the good faith criterion. The claimant contended that he had no ability to work as a result of his compensable injury during the qualifying period for the 10th quarter. Rule 130.102(d)(4) provides that an injured employee has made a good faith effort to obtain employment commensurate with the employee's ability to work if the employee has been unable to perform any type of work in any capacity, has provided a narrative report from a doctor which specifically explains how the injury causes a total inability to work, and no other records show that the injured employee is able to return to work.

We note that this case involves the interpretation and application of Section 408.151 and Rule 130.110. Section 408.151(b) provides:

> If a dispute exists as to whether the employee's medical condition has improved sufficiently to allow the employee to return to work, the [Commission] shall direct the employee to be examined by a designated doctor chosen by the commission. The designated doctor shall report to the commission. The report of the designated doctor has presumptive weight, and the commission shall base its determination of whether the employee's medical condition has improved sufficiently to allow the employee to return to work on that report unless the great weight of the other medical evidence is to the contrary.

In addition, Rule 130.110(a) provides, in pertinent part, as follows:

> The report of the designated doctor shall have presumptive weight unless the great weight of the other medical evidence is to the contrary. The presumptive weight afforded the designated doctor's report shall begin the date the report is received by the commission and shall continue: (1) until proven otherwise by the great weight of the other medical evidence; or (2) until the designated doctor amends his/her report based on newly provided medical or physical evidence.

A designated doctor was appointed in this case pursuant to Section 408.151 and she issued her opinion on November 4, 2002, that the claimant could work. Pursuant to Rule 130.110, the designated doctor's report is afforded presumptive weight from the time that the Commission receives the report. Although the report is dated November 4, 2002, there is no evidence of when, or even if, the Commission received that report during the qualifying period. Although a date stamp of November 14, 2002, shows that the carrier received the report on that date, which was after the end of the qualifying period, there was no evidence offered as to when the report was received by the Commission. Consequently, the report is not entitled to presumptive weight. Texas Workers' Compensation Commission Appeal No. 022604-s, decided November 25, 2002. Thus, there was no error in the hearing officer's not giving presumptive weight to the report of the designated error.

Nor do we find error in the hearing officer's finding that the great weight of the other medical evidence was contrary to the report of the designated doctor. Whether or not the great weight is contrary to the report of a designated doctor is a question of fact. Section 410.165(a) provides that the contested case hearing officer, as finder of fact, is the sole judge of the relevance and materiality of the evidence as well as of the weight and credibility that is to be given the evidence. It was for the hearing officer, as trier of fact, to resolve the inconsistencies and conflicts in the evidence. Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d 701, 702 (Tex. Civ. App.-Amarillo 1974, no writ). This is equally true regarding medical evidence. Texas Employers Insurance Association v. Campos, 666 S.W.2d 286, 290 (Tex. App.-Houston [14th Dist.] 1984, no writ). The trier of fact may believe all, part, or none of the testimony of any witness. Taylor v. Lewis, 553 S.W.2d 153, 161 (Tex. Civ. App.-Amarillo 1977, writ ref'd n.r.e.); Aetna Insurance Co. v. English, 204 S.W.2d 850 (Tex. Civ. App.-Fort Worth 1947, no writ). An appeals-level body is not a fact finder and does not normally pass upon the credibility of witnesses or substitute its own judgment for that of the trier of fact, even if the evidence would support a different result. National Union Fire Insurance Company of Pittsburgh, Pennsylvania v. Soto, 819 S.W.2d 619, 620 (Tex. App.-El Paso 1991, writ denied). When reviewing a hearing officer's decision for factual sufficiency of the evidence we should reverse such decision only if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986).

While we have required a hearing officer to provide an explanation of why the great weight of the medical evidence is contrary to the report of a designated doctor, the hearing officer in the present case details his reasoning for so finding. In light of his explanation, we find no error in his factual finding and in his decision not to give presumptive weight to the report of the designated doctor.

The decision and order of the hearing officer are affirmed.

The true corporate name of the insurance carrier is **TEXAS MUTUAL INSURANCE COMPANY** and the name and address of its registered agent for service of process is

MR. RUSSEL R. OLIVER, PRESIDENT
221 WEST 6TH STREET
AUSTIN, TEXAS 78701.

_____
Gary L. Kilgore
Appeals Judge

CONCUR:

_____
Chris Cowan
Appeals Judge

_____
Edward Vilano
Appeals Judge